U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date Issued: April 27, 1999

Case No.: 1996-INA-00488

***In the Matter of*:**

SYBASE, INC,
Employer,

On Behalf of

GARUDAPURAM S. MADHUSUDAN**,**
Alien.

Certifying Officer: Paul R. Nelson, Region IX

Appearance: Cynthia J. Lange, Esq.

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

This case arises from an application for labor certification filed on June 7, 1993, by Sybase, Inc. for the position of Senior Software Engineer seeking labor certification for Garudapuram S. Madhusudan, Alien (AF 67). The duties of the job were described as follows:

> Senior Software Engineer engaged in development of relational database management systems (RDBMS) products. Design, write and implement functional specifications for new features in the area of software security and internationalization for SQL server. Ensure portability of source code and Quality Assurance (QA) tests, trouble shoot, reproduce bugs, debug and fix test and source code bugs. Provide technical input to the designs of other engineers as needed. In general, responsibilities include design of conceptual approach, coding and debugging and assisting in product planning, long range technical planning and assessment of business opportunities. Development in C/Unix environment.

Employer required that applicants have a B.S. degree in Computer Science or Electrical Engineering and two years of experience in the job offered or two years of experience as a Software Development Engineer. In addition, Employer required that applicants have experience in large systems development, experience in developing in C/Unix environment and with commercial RDBMS products, including: SQL, software security and internationalization.

The Certifying Officer (CO) issued a Notice of Finding (NOF) proposing to deny certification on December 28, 1994 (AF 52-65). The CO stated that Employer failed to document that (1) it is offering its minimum job requirements; (2) there are no unduly restrictive job requirements; (3) U.S. applicant Edward Lee was recruited in good faith and rejected solely for lawful job-related reasons; (4) Employer's laid-off U.S. workers are not qualified; (5) U.S. workers were offered the same terms of employment as the Alien; and (6) the job is truly open to U.S. workers.

The CO stated that it appears that the Alien gained his experience in commercial RDBMS products, including SQL, and experience in software security and internationalization while working for Employer, either as an employee or consultant. Employer was instructed to delete

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

these requirements and retest the labor market, or document why it is not now feasible to hire anyone with less than these requirements, or document that the Alien obtained the required experience or training elsewhere. The CO also stated that the requirements of a B. S. degree in Computer Science or Electrical Engineering without allowing the substitution of a Master's degree for work experience and internationalization are unduly restrictive job requirements. Employer was instructed to delete the restrictive requirements and retest the labor market, establish that they arise from a business necessity, or establish that they are common for the occupation in the United States. The CO also stated that the requirement of "internationalization" had not been defined or explained and that it was not evident that it is a major requirement of the job.

The CO identified seven employees laid-off by Employer and instructed Employer to present documentation regarding the effect of employee lay-offs on positions having the same or similar requirements as the offered position and to attempt to recruit any laid-off employee who meets the minimum requirements for this job. In addition, the CO noted that state unemployment insurance records indicate that these workers were laid-off because the needs of the position changed, the position was eliminated, or the department was reorganized or restructured. Accordingly, the CO instructed Employer to document what skill or skills were mismatched, show what title each laid-off worker had, what specific skills that employee had and how those skills would not be transferable. The CO also stated that if a laid-off engineer was not qualified, Employer must submit justification from a technical expert and show the qualifications of the expert and that the expert is not the Alien.

As to U.S. applicant Edward Lee, the CO stated that on the basis of his resume he appears to be qualified and Employer has not shown that he lacks experience with either internationalization or software security or that Employer recruited him in good faith by contacting him to determine if he meets the minimum job requirements. In addition, the CO stated that Mr. Lee had responded to a questionnaire stating that he has had experience that is not reflected in his resume.

The CO stated further that Employer's payroll records indicate that the Alien is being paid at an annual rate in excess of that offered to U.S. workers. Employer was instructed to document that U.S. workers are being offered the same terms as the Alien or submit an amendment to the labor certification application and retest the labor market.

Employer, by counsel, submitted rebuttal on March 24, 1995 (AF 25-42). Rebuttal consists of a letter with attachments from the Director of Compensation and Benefits. The Director stated that the Alien obtained all of the minimum requirements for this job prior to working for Sybase, either as an employee or contractor. The Director also defined "internationalization" as the term used to describe the modifications required to make computer systems usable in non-English environments. He stated further that this job requirement is justified as a business necessity because of increasing sales at foreign sites. The Director also stated that Employer had made a good faith effort at recruitment and that no qualified U.S. workers applied for the position. The Director stated further that the workers specified in the NOF were not qualified for the job and that the job was offered to U.S. workers on the same terms and conditions as offered to the Alien. Documentation accompanying the letter indicated

that the Alien was being paid the advertised wage (AF 40-42). The Director also stated that U.S. applicant Edward Lee is not qualified for the job because he lacks experience in developing large systems and has had no experience working with the internals of a database system; that his resume does not reflect his alleged experience with database compilers and internal architecture; that Mr. Lee's experience with SQL is restricted to application programming and not to the development of database systems; and that he has had no experience with security software or internationalization.

The Director refused to identify by name the seven employees who were named in the NOF as having left employment with Sybase. The Director referred to the employees using letters A through G and briefly described their job titles and past job experience gleaned from their resumes, as well as stating why they could not qualify for the offered job (AF 38-39). The Director also offered to provide additional information regarding these former employees off the record.

The CO issued a Final Determination (FD) denying certification on July 5, 1995 (AF 18-24). The CO stated that Employer's policy of protecting the identity of former employers is in conflict with the CO's requirement for documentation; that it prevents the CO from following-up to verify the information provided by Employer. The CO also stated that Employer's rebuttal was not persuasive because Employer failed to submit the resumes and records of the seven laid-off employees identified in the NOF. The CO stated that Employer's rebuttal statements contradict the reasons given for the lay-offs in state unemployment insurance records; that the information provided in regard to former employee "F", who appears to be an engineer, is not sufficient to enable the CO to review his qualification; moreover, it is not clear that the information provided from his resume is current. The CO stated that based on the scant information provided by Employer, it is not possible to determine if employee "F" is truly lacking the qualifications for the job. The CO concluded that Employer's documentation falls short of that needed to establish that the laid-off U.S. workers are not qualified and available for the job.

The CO also determined that Employer's reasons for rejecting applicant Lee without an interview were not persuasive. The CO stated that Mr. Lee's one page resume included the major requirements of the job; that Mr. Lee has a Master's degree and at least nine years of experience; that Mr. Lee responded to a questionnaire that he does have experience with database internals; that it is unclear how Employer determined that Mr. Lee's SQL experience is limited to applications programming when his resume does not reflect that limitation and he was not interviewed, or how it could be determined by Employer that he lacks the job requirement of experience with commercial RDBMS products, including SQL. The CO stated further that despite the listing of experience with SQL, C and Unix on Mr Lee's resume, Employer has incorrectly placed a burden on the applicant to have submitted more detailed information to prove that he deserves to be contacted.

The CO concluded that Employer had failed to document that none of its laid-off workers are qualified or available for the offered job and that applicant Lee was rejected solely for lawful job-related reasons. The CO did not consider additional evidence submitted by Employer after expiration of the rebuttal period.

Employer, by counsel, requested administrative-judicial review on August 10, 1995 (AF 1-17). Counsel contends that the CO erred by substituting his judgment for Sybase's judgement and by deciding that Employee "F" was qualified for the position. Counsel also contends that U.S. applicant Lee is not qualified for the position.

Discussion

The issues are whether Employer rejected U.S. applicant Edward Lee for lawful Job-related reasons [2] and whether Employer adequately complied with the CO's request for information regarding the job qualifications of seven recently laid-off Sybase employees.

Twenty C.F.R. § 656.20(C)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. 20 C.F.R. § 656.21(b)(6) and 656.21(j)(1) provide that if U.S. workers have applied for the job, employer must document that they were rejected solely for lawful job-related reasons. An employer that fails to explain or document the U. S. applicant's lack of qualifications fails to specify a lawful job-related reason for rejecting the U.S. applicant. *Seaboard Farms of Athens, Inc.*, 90-INA-383 (Dec. 3, 1991); *Tulasi Polavarapu, M. D.*, 90-INA-333 (Oct. 29, 1991); *D & J Finishing, Inc.*, 90-INA-446 (Aug. 13, 1991); *Poquito Mas*, 88-INA-486 (Feb. 26, 1990). In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for the job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancillas International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1998)

Mr. Edward Lee, a U.S. applicant, submitted a one page resume in response to Employer's job advertisement. His resume consists of brief references to his software, hardware and approximately nine years of work experience. It also reflects that he has a Bachelor and Master's degree in Electrical Engineering and Computer Science. His resume indicates that he meets all of Employer's job requirements except experience with commercial RDBMS products, software security and internationalization. Employer rejected Mr. Lee on the basis of his resume without an interview or further inquiry into the full extent of his experience and qualifications. On the basis of Mr. Lee's brief resume, Employer determined that Mr. Lee does not have experience in developing large systems, that "his experience is restricted to <u>either</u> application level software or software for single user IBM PCS." (AF 33; emphasis added); that he has worked only with database application software and has no experience working with the internals of a database system. However, contrary to these assumptions, Mr. Lee responded to an inquiry from the CO stating he has had experience with database compilers and internal architecture (AF 91). To which Employer responded "...he (Mr. Lee) does not explain how he obtained his experience and such experience is not evident from his resume" (AF 33). This is precisely the point. Mr. Lee's resume is only a brief summary of his experience and qualification, the full extent of which can only be obtained by interviewing the applicant. Employer makes many assumption regarding the extent of Mr. Lee's experience and presents these assumptions as reasons for rejecting the applicant.

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[2] The Co raised the issue in the NOF of whether Employer recruited Mr. Lee in good faith, but made no determination regarding this issue in the FD. Nevertheless, we would point out that Employers must recruit U.S. workers in good faith. *H.C. LaMarche Ente.Inc*, 87-INA-607 (Oct. 27, 1988).

Where an applicant such as Mr. Lee, who has an extensive computer engineering background and education, clearly lists experience in his resume in all but a few of the special job requirements, it is incorrect and contrary to law for an employer to place a burden on that applicant to have submitted more detailed information to prove that he deserves to be contacted. On the basis of the information submitted by Mr. Lee, it reasonably appeared that he could be qualified for the position. The burden was on Employer to initiate a contact and interview Mr. Lee. *Gorchev & Gorghev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*).

On the basis of this record, we cannot accept Employer's reasons for rejecting Mr. Lee without an interview as lawful and job-related. Employer failed to take the steps necessary to fully investigate Mr. Lee's qualifications and did not establish by convincing evidence that he is not qualified for the job. *Nationwide Body Shops, Inc.*, 90-INA-286 (Oct.31, 1991). We find that Employer rejected U. S. applicant Lee for other than lawful job-related reasons. Accordingly, certification was properly denied and the remaining issue need not be decided.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.